

I read the passage, the constable who arrests a person without a warrant takes the risk of justifying the apprehension.

Here it is not alleged that the pursuer had in fact committed the crime with which he was charged, but looking to the provisions of the statute this is, I think, not necessary to justify the constables. It is enough if the jury think that they did not act without reasonable grounds of suspicion, and it is important that this should be put pointedly in issue rather than explained as it might be by the judge at the trial. The presumption is that the officer acts in pursuance of his duty, and the pursuer must rebut this presumption. I propose, therefore, that the issue which we allow should be expressed as follows—"Whether on or about 14th October 1912 the defenders wrongfully and illegally, and without reasonable grounds of suspicion, apprehended the pursuer," and so on, as in the form proposed. It is said that this is a departure from the stereotyped form, and that the Court ought to be slow to introduce any novelties into the forms of issue. I assent generally to that view, but each issue must be adjusted according to the particular circumstances of the case, and there is no authority which settles conclusively the form of issue where a police constable effects an arrest without a warrant but acting under statutory authority. It is obvious that the pursuer cannot succeed unless he convinces the jury that the defenders had no reasonable cause to suspect him of the crime charged, and it is desirable that officers of the law should as far as possible be protected in the discharge of their duty by the grounds of liability being pointedly brought under the notice of the jury.

LORD DUNDAS—I agree that an issue ought to be allowed in the terms suggested by Lord Salvesen and that substantially upon the grounds he has so fully explained. I have had an opportunity of reading his opinion and I add nothing more.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Sheriff-Substitute of Lanarkshire, dated 25th February 1913, varied the issue by adding after the word "illegally" in the second line thereof the words "and without reasonable grounds of suspicion," and with this addition approved of the said issue.

Counsel for the Pursuer and Appellant—Watt, K.C.—A. M. Mackay. Agent—J. Ferguson Reekie, Solicitor.

Counsel for the Defenders and Respondents—Morison, K.C.—Macquisten. Agents—Campbell & Smith, S.S.C.

Friday, July 4.

SECOND DIVISION.

TENNENT AND OTHERS (MONTGOMERIE-FLEMING'S TRUSTEES).

Succession — Testament — Construction — Liferent or Right of Occupancy of House.

A testator in his trust-settlement expressed a wish that his son and four daughters should live together at his house so long as they remained unmarried, but that in the event of the marriage of the son he should occupy the house, and the trustees were directed in that event to convey it to him under such burdens as existed at the testator's death, and since the unmarried daughters would thereby be "deprived of a residence," it was provided that the son should pay an annuity to each of them during spinsterhood. The residue of the estate was bequeathed to the extent of two-sixths to the son in fee and to the extent of one-sixth each to the daughters in liferent and their issue in fee.

Held that the interest of the son and unmarried daughters in the house was a mere right of occupancy and not a liferent.

Hugh Tennent and others, testamentary trustees of James Brown Montgomerie-Fleming of Kelvinside, Glasgow, *first parties*; Mrs Elizabeth Tennent Montgomerie-Fleming or Carre, and others, the whole married children of the testator, *second parties*; James Brown Montgomerie-Fleming, only son of the testator, *third party*; and Miss Margaret Mary Montgomerie-Fleming, an unmarried daughter of the testator, *fourth party*, presented a Special Case for the opinion and judgment of the Court of Session.

The testator died on 18th June 1899, leaving a trust-disposition and settlement by which he conveyed his whole estate to the first parties as trustees, and provided—"In the fourth place, it is my wish and desire that on the death or second marriage of my said wife, my children should, so long as they remain unmarried, live together at Beaconsfield House, Kelvinside. And further, as it is my wish and desire that my son James Brown Montgomerie-Fleming, junior, should occupy Beaconsfield House on his marriage, I hereby direct and appoint my said trustees, on the death or second marriage of my said wife, if and when the whole of my daughters are married, or when my son is married, whichever of these latter events shall first happen, to assign and dispone to my son the said James Brown Montgomerie-Fleming, junior, and his heirs and assignees, the said Beaconsfield House . . . but that under such burdens as may at the date of my death exist over the said subjects: Declaring that as my unmarried daughters will, on my son's marriage and entry to and occupation of Beaconsfield House and pertinents before mentioned,

be deprived of a residence at Beaconsfield, I provide and declare that my son, if and when my unmarried daughters are so deprived of a residence at Beaconsfield, shall be bound and obliged, as by acceptance of the foresaid conveyance in his favour of Beaconsfield House and others before mentioned he shall be held to bind and oblige himself, to make payment to each of my unmarried daughters till each of them shall respectively be married of a free yearly annuity of fifty pounds. . . . Declaring that if and when each of my daughters shall be married the annuity of the daughter so getting married shall cease as at the date of such marriage." By the fifth purpose the trustees were directed "to hold, apply, convey, and make over" the residue of the testator's whole estate "to and in favour of and for behoof of" his son to the extent of two-sixths, and his four daughters each to the extent of one-sixth, "the share falling to my son to be paid and conveyed by my trustees to him in fee, and the shares falling to my daughters to be held, applied, paid, and conveyed by my trustees to and for behoof of them respectively for their respective liferent alimentary uses alienably . . . , and on their respective deaths to and for behoof of their respective children in fee. . . ." [Beaconsfield House is now known as Kelvinside House.]

The testator was survived by his widow, who died on the 14th day of February 1913. At the testator's death all his children were unmarried. At the date of the case three of his children, viz., the second parties thereto, had married, and the third and fourth parties were the only two unmarried children.

The first and second parties maintained that the testator in desiring that his unmarried children should live together at Kelvinside House meant that the third and fourth parties were entitled, on a sound construction of the trust-disposition and settlement, to a liferent use and enjoyment of Kelvinside House until the marriage of either.

The third and fourth parties maintained on the other hand that they were entitled to a mere right of occupation of Kelvinside House until the marriage of either, free of the annual burdens or any of them, and on payment only of the usual charges falling to be paid by a tenant occupier.

Amongst the questions of law stated in the case was the following question:—"Are the third and fourth parties entitled to have (a) the liferent use and enjoyment of Kelvinside House and pertinents until the marriage of either, or (b) a mere right of occupation of Kelvinside House until the marriage of either?"

Argued for the first and second parties—The testator intended to confer on the third and fourth parties a right of liferent, not a mere right of occupation. The question must be determined by the language and provisions of the deed.—*Johnstone v. Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, per Lord Shaw at 111, 49 S.L.R. 986 at 988. The language of the deed showed that the

testator intended a liferent. It was not necessary to use words of style in order to confer a liferent, and the absence of the word "liferent" from the bequest did not prove that the testator did not intend one. Moreover it was not essential to the constitution of a liferent that it should subsist during the entire lifetime of the beneficiary—*Glover's Trustees v. Glover*, 1913 S.C. 115, 50 S.L.R. 71. If the right were merely a right of occupancy, the burdens would fall on the residue of the trust estate, but there was no fund of residue in the hands of the trustees out of which to meet the burdens, because the son had the right to demand payment from the trustees of his share of the residue. Therefore the testator must have intended that the third and fourth parties should be liferenters, for as liferenters they themselves would bear the burdens.

Argued for the third and fourth parties—The testator intended to confer on the third and fourth parties a right of occupation only, not a right of liferent. The language of the deed showed that it was not intended to confer a liferent.—*Johnstone v. Mackenzie's Trustees*, 1911 S.C. 321, per Lord Guthrie (Ordinary) at 324, 48 S.L.R. 256 at 257. The word "liferent" was not used in the deed. Moreover the deed provided that the son must pay to each of his unmarried sisters a compensatory allowance of £50 per annum in the event of the son's marrying and thus depriving his sisters of the right to live in the house. Thus it was apparent that the right which the testator intended to confer was a right of the value of £50 per annum, and the right in question could not be a right of liferent, because, if the sisters survived their brother the burdens which they as liferenters would have to bear would reduce the annual value of each's right to less than £50. Therefore the testator must have intended to confer a right of occupancy merely, for a right of occupancy, as distinct from a right of liferent, was free from such burdens. *Johnstone v. Mackenzie's Trustees*, 1912 S.C. (H.L.) 106, 49 S.L.R. 986, was different, because in that case the testator had in view what he did not have in view in the present case, viz., a particular period at which the distribution of the property liferented was to be made. *Smart's Trustee v. Smart's Trustees*, 1912 S.C. 87, 49 S.L.R. 42, and *Clark*, January 19, 1871, 9 Macph. 435, 8 S.L.R. 314, were referred to.

At advising—

LORD DUNDAS—Mr James Brown Montgomerie-Fleming died on 18th June 1899, leaving a trust-disposition and settlement dated 4th February 1898. The trustees acting under that settlement are the first parties to this Special Case. The testator was survived by his widow, who died on 14th February 1913, and by five children of the marriage—four daughters and one son—who still survive and are all now of full age. Since the testator's death three of the daughters have married, and they are the second parties to the case. The un-

married daughter is the fourth party, and the son, who is unmarried, is the third party. The questions raised have regard particularly to the fourth purpose of the settlement.

By the second question we are asked—“Are the third and fourth parties entitled to have (a) the life interest use and enjoyment of Kelvinside House and pertinents until the marriage of either, or (b) a mere right of occupation of Kelvinside House until the marriage of either?” In my opinion we should answer head (a) in the negative and head (b) in the affirmative. As matter of fair and reasonable construction of the language of the settlement, according to the natural and ordinary meaning of the words used, I think the testator did not intend to create a right of “life interest” in the strict legal sense, but that the house and pertinents should be used as a home or residence where his unmarried children should live together so long as any of the daughters remained single and until the son should marry. They were to occupy the house, but I do not think they could have let it. The testator evidently viewed this as a valuable privilege to his unmarried daughters, for in the event of any of them being “deprived of a residence” in Kelvinside House by his son’s marriage and entry to the premises, the son was taken bound to pay each of his unmarried sisters a compensatory allowance of £50 a year until they should marry. It does not seem consistent with this idea, when one looks at some of the figures disclosed in the case, that the unmarried children should during their occupancy of the house have to bear the full legal burdens which would attach to proper life tenants. I do not think the mere fact that the occupation was not intended necessarily to subsist during the whole lives of the daughters, but only until marriage, is in itself sufficient to negative the theory of a proper life tenant (cf. *Glover’s Trs. v. Glover*). On the other hand, one observes that the property is to be conveyed to the son if he marries, “under such burdens as may at the date of my death exist over the said subjects.” As matter of construction, I have no difficulty in affirming that the testator’s intention must be held to have been to give a right of occupation, and not of proper life interest use and enjoyment, to his unmarried children. The cases to which we were referred seem to me to support this view. Each case of the kind must, of course, depend upon the particular terms of the settlement under consideration. But some light may be obtained from the decisions, especially from the recent judgment of the House of Lords in *Johnstone v. Mackenzie’s Trs.* “Two propositions of general import” were there stated by Lord Shaw, who delivered the only opinion of the House. “First, the extent of the obligations attaching to a right of this character conferred by deed or settlement is a question to be determined by the intention of the maker, as that intention can be derived from the language which he has employed, and from the

provisions which he has made with regard to, *inter alia*, the administration and realisation of his estate. Secondly, when the language employed is entirely apt and appropriate for the creation of an ordinary life interest right, it rests upon those who contend that the ordinary obligations which attach to a life tenant should not apply to him in the particular case—it rests upon those putting forward such a proposition of exception to establish it.” The language of this settlement does not, in my opinion, comply with the test of being “entirely apt and appropriate for the creation of an ordinary life interest.” It is significant that no case was cited, and I am not aware that there is any, where an ordinary life interest has been held to have been created without the words “life interest use and enjoyment,” or words of clearly similar import and effect. As regards Lord Shaw’s first proposition, I have already indicated the reasons which lead me to think that the testator’s intention was not to create a life interest but merely to give a right of occupation. It was argued that upon that footing there would here be no fund from which the trustees could satisfy the burdens from which, *ex hypothesi*, the occupiers were intended to be freed. I do not think this is so. The trustees have in point of fact the whole residue in their hands. They are bound to retain two-thirds of it for behoof of the daughters in life interest alimentary and their issue in fee. Even as regards the son’s one-third of the residue, I see no reason to doubt that, if he called upon the trustees to pay it over to him—which he has not yet done, and I gather that there are practical reasons which make it improbable that he will do so,—they would be entitled to retain, as against his demand, a portion of his share sufficient to meet one-fifth of the burdens effecting to the occupation of the premises in question. This is not, therefore, a case such as Lord Shaw figures (*Johnstone*, 1912 S.C. (H.L.) at p. 110), where “the residue is in fact distributed and the fund available for disbursements of trust charges is gone.” I am not sure whether the actual judgment of the First Division in *Smart’s Trs.* can be regarded as authoritative since the decision of the House of Lords in *Johnstone’s* case. It was laid before that House in the argument, but is not specially referred to in Lord Shaw’s opinion. Assuming, however, that the decision in *Smart’s Trs.* has been overruled, I see no reason to doubt that Lord Dunedin’s observations upon the point I am dealing with are sound law; and they seem to be apposite to this case. His Lordship said (1912 S.C. at p. 92)—“It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. Whether trustees as a matter of fact should retain part of the residue in order to meet these burdens is a question for themselves, and a question of circumstances. I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a

direction that you are to give a certain person one thing or another."

[His Lordship dealt with the remaining questions on which the case is not reported.]

LORD SALVESEN—The substantial question in this case is whether under the fourth purpose of the testator's trust-disposition and settlement his unmarried children were given a proper liferent of the house in which he resided at his death, or merely a personal right of occupation. In the former event, according to the decision of the House of Lords in *Johnstone v. Mackenzie's Trs.*, the burdens on the property fall to be paid by the liferenters; in the latter event the burdens fall to be borne like any other annual debt affecting the trust estate out of the income before distribution of the surplus amongst the beneficiaries.

It was argued for the first and second parties that the present case is ruled by the decision in *Johnstone v. Mackenzie's Trs.* With every desire to follow loyally the views laid down by the House of Lords (which indeed I should myself have given effect to in that case had I not conceived myself bound by a chain of previous decisions) I have found myself unable to assent to this view. The dominant consideration is the intention of the testator as it can be gathered from the language of the instrument. Here there are no words constituting a liferent. The testator simply expressed his desire that his children so long as they remained unmarried should live together at Kelvinside House. He plainly regarded this as a privilege, because he provides in a later clause that in the event of his daughters being deprived of a residence there in consequence of the direction to the trustees to make over the house to his son on his marriage, the latter was to pay each of them a free yearly annuity of £50 so long as they remained unmarried. In a rough way, accordingly, he valued the privilege to each of his unmarried daughters of residing in the house at £50; whereas in the event which has happened of there being only two children in a position to take advantage of the privilege, the cost of occupation approximates £150 for each if they are to bear the annual burdens effecting to the property. These burdens all existed at the time when the will was drawn; and that the testator had them fully in view is plain from the express provision which he makes that the conveyance in favour of his son when it comes to be made is to be "under such burdens as may at the date of my death exist over said subjects."

Further, if the view of the first and second parties be well founded, it must be assumed that the testator intended that the right of occupation should become more burdensome as the numbers of those entitled to occupy diminished. If all the children had remained unmarried, no practical question would have arisen as to the source from which the burdens were to be provided; but as soon as one daughter

married and left the family home, a conflict of interest would at once arise. It can scarcely be maintained that the testator did not contemplate the successive marriages of his daughters; and if while they all resided in family together the burdens were borne equally, it is difficult to suppose that whenever one left to make her home with her husband a new system should be inaugurated. The daughter who married no longer required the family home as a residence; and it is not unreasonable to suppose that the testator did not desire the children who remained in occupation to have their position thereby changed for the worse. All these circumstances lead me to the conclusion that it was not the testator's intention that his unmarried children should pay for the privilege of residing together in the family home.

Is there, then, anything in the other provisions of the trust settlement which tend to a contrary result? It was said that the residue clause, while it provides for the trustees holding the daughters' shares and paying them only the annual income, gives the testator's son right to demand payment of his share of the residue, and that there is thus no fund out of which the burdens can annually be met. I think there is a plain fallacy here. If what is conferred upon the unmarried children is a mere right of occupancy, then the annual burdens on the property, so long as it is held by the trustees, are debts due by the trust estate which must be provided for *pro tanto* before the son's share of residue is paid over. The circumstances of this case are entirely different from those which influenced the judgment in *Johnstone v. Mackenzie's Trs.* The only sum which remained undistributed in the latter case was the £20,000 expressly set aside to provide an annuity. The capital of this sum was conveyed to another set of beneficiaries; and the surplus revenue after payment of the annuity was specially destined. There is nothing of the kind here, and I respectfully concur in the opinion of Lord President Dunedin in the case of *Smart's Tr. v. Smart's Trs.*, where he says—"It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. . . . I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a direction that you are to give a certain person one thing or another."

The above considerations lead me to the conclusion that the right conferred on the unmarried children of the testator was not a proper liferent but a personal privilege; and that this case is ruled by the decision in the case of *Clark* which was approved by the House of Lords. There are other considerations pointing in the same direction. It is an inherent quality of a true liferent of a heritable subject that the liferenter need not occupy it, but is entitled to let it and to draw the rents. This cannot be affirmed of a right to occupy

a house which is shared by others. So long as one of the privileged class wishes to occupy in person, obviously the others could not let their right of occupation to third parties. This would be to defeat the purpose of the testator, which was to provide a joint residence for his unmarried children. The right is a purely personal one; and if none of them desire to exercise it the result would seem to be that the trustees could let the house for the benefit of the trust estate. Moreover, it is not a privilege that is primarily intended as lasting during life. I do not say that a bequest of the life-rent use of a dwelling-house to a person so long as he or she remained unmarried would not have the qualities of a true life-rent. It might subsist during the whole of the legatee's life; but the testator here, I think, really contemplated that the right of occupation would cease during the lifetime of all or most of his children. It would only not do so if his son or one or more of the latter's sisters did not marry. If the son married, or all the daughters, the right of occupation would equally come to an end. I am therefore of opinion that head (a) of the second query falls to be answered in the negative and head (b) in the affirmative.

[His Lordship then dealt with the other questions in the case.]

LORD GUTHRIE—I am of the same opinion. This case has evidently been brought in order to settle the question which is raised in the second query. It was admitted that no case has hitherto occurred in which the use, permanent or limited, of a house has been held to come within the category of life-rent use and enjoyment without the use of the word "life-rent." It was not maintained that there might not be an equivalent expression which might be conceived going to the same result. In the absence of the word life-rent are there any equivalents to be found in the trust-disposition and settlement? I can find none, and I conclude both from the words of the will and from the surrounding circumstances of the testator and his family that only a right of occupancy was intended. The testator talks of his unmarried daughters being deprived of a residence at Beaconsfield House, and, as I understand, what he gave them was a residence at Beaconsfield House and nothing more. That seems to me to be quite in the same line as the expression in the case of *Clark* "use of my house," which was held only to give a mere right of occupancy.

The LORD JUSTICE-CLERK was absent.

The Court answered head (a) of the second question in the negative, and head (b) in the affirmative.

Counsel for the First and Second Parties—Gilchrist. Agents—H. B. & F. J. Dewar, W.S.

Counsel for Third and Fourth Parties—D. P. Fleming. Agents—Laing & Motherwell, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, June 10.

(Before the Lord Justice-General, Lord Kinneir, and Lord Johnston.)

ROBSON v. MENZIES.

Justiciary Cases—Small Debt Appeal—Review—"Incompetency"—"Malice and Oppression"—Decree Proceeding on Incompetent Evidence—Small Debt (Scotland) Act 1837 (7 Will. IV and 1 Vict. cap. 41), sec. 31.

In a small debt action by a landlord against a tenant for payment of the proportion of rates and taxes applicable to the period of the tenant's occupancy of a house, the Sheriff-Substitute declined to look at the lease which was produced, but *ex proprio motu* he took parole evidence as to the purpose for which the house was let, and assoiled the defender.

The pursuer, founding solely on the rejection and admission of evidence, appealed on the grounds of "incompetency" and "malice and oppression on the part of the Sheriff."

Held that if the Sheriff-Substitute was wrong in admitting the evidence objected to, his error was one of law which was not open to review, and did not amount to "incompetency," which meant incompetency of the Court to try the question, or "malice and oppression," which implied a failure of duty, not an error in judgment, and appeal dismissed.

The Small Debt Act 1837 (7 Will. IV and 1 Vict. cap. 41), sec. 31, enacts—"It shall be competent to any person conceiving himself aggrieved by any decree given by any sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before . . . the High Court of Justiciary . . . : Provided always that such appeal shall be competent only when founded on the ground of corruption, or malice and oppression on the part of the sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the sheriff. . . ."

This was an appeal by William Frier Robson of Southfield, Duns, *pursuer and appellant*, against a judgment of the Sheriff-Substitute (MACAULAY SMITH) in a small-debt action raised by him in the Sheriff Court at Duns against Colonel Charles Thomson Menzies of Kames, *defender and respondent*.

The pursuer's claim against the defender was for one-half of certain taxes paid by the pursuer, due by the defender as occupier of Southfield in succession to the pursuer for the space of six months from 1st October 1912.